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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

FRANCISCO RONDINELLI,

Plaintiff and Appellant,

v.

RALPHS GROCERY COMPANY,

Defendant and Respondent.

B162955

(Los Angeles County
Super. Ct. No. LC 055277)

APPEAL from an order of the Superior Court of Los Angeles County.
Stephen D. Petersen, Judge. Affirmed.

Francisco Rondinelli, in pro. per., for Plaintiff and Appellant.

Stone, Rosenblatt & Cha and Gregory S. Miller for Defendant and
Respondent.

Plaintiff Francisco Rondinelli appeals from the order denying his Code of Civil Procedure section 473 motion to set aside the dismissal of his case.¹ Plaintiff contends he submitted sufficient evidence to warrant setting aside the dismissal. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

On February 23, 2001, plaintiff filed a complaint for negligence and premises liability alleging that he had been injured as a result of a slip and fall accident at one of defendant Ralphs Grocery Company's ("Ralphs") stores.

Plaintiff consistently failed to respond to discovery. On July 31, the court granted Ralphs' motions to compel responses to form interrogatories, special interrogatories and request for production of documents and sanctioned plaintiff and his attorney \$736.

After plaintiff ignored the court's order and failed to provide answers within the required 10 days, Ralphs filed a motion to dismiss for violation of the court's order. Ralphs voluntarily took the motion off-calendar and filed a motion to compel further responses after plaintiff agreed to appear for deposition and provided some responses, even though the responses were inadequate and failed to provide information within plaintiff's knowledge. For example, plaintiff denied sufficient knowledge to answer interrogatories concerning whether he had prior personal injury claims, prior injuries, or pre-existing disabilities at the time of the subject incident. Plaintiff did not answer questions whether he had any personal knowledge of facts suggesting Ralphs had notice of the alleged dangerous condition and failed to provide contact information for the one percipient witness, who was also his best friend and who thereafter transported and accompanied plaintiff to every court hearing.

¹ A statutory motion to vacate an appealable judgment or order is appealable as an order after final judgment. (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) § 2:171.)

Thereafter, plaintiff failed to appear for his deposition on three separate occasions; each time Ralphs cooperated in an effort to reschedule the deposition so that it could be obtained without seeking a court order. Ralphs eventually had to seek a court order. The court granted Ralphs' motion to compel plaintiff to appear for deposition and sanctioned plaintiff and his attorney \$888, which was never paid. The court warned plaintiff failure to appear would result in the dismissal of his case with prejudice.

Plaintiff still continued to refuse to provide further responses to written discovery or appear for deposition. After several meet and confer letters and numerous phone calls, Ralphs was forced to bring motions. The court ordered plaintiff to provide further answers and sanctioned plaintiff and his attorney \$851, which also has not been paid. The court ordered plaintiff to provide further answers before the court-ordered deposition on November 20. Plaintiff was present in court when the court made the orders. After plaintiff failed to comply with the orders, Ralphs sought terminating sanctions.

On December 4, the court granted the motion of plaintiff's counsel to withdraw, but gave plaintiff one last chance and continued the motion for terminating sanctions to January 2, 2002. The court ordered plaintiff, who was present in court, to provide further verified answers to the discovery requests within 10 days and sanctioned plaintiff \$3,000, which was never paid.² Plaintiff failed to provide further answers and failed to appear for his noticed independent medical examination, resulting in defense counsel being billed \$400 for the non-appearance.

On January 2, the court dismissed the case based on plaintiff's long history of abuse of the discovery process.

On August 22, the court denied plaintiff's motion to set aside the dismissal. Plaintiff was represented at the hearing.

² Plaintiff's unpaid sanctions totalled \$4,739.

Plaintiff filed a timely notice of appeal from the order denying his motion to set aside the dismissal.³

DISCUSSION

“A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) “The burden is on the appellant, not alone to show error, but to show injury from the error.” (Emphasis deleted.) (9 Witkin, Cal. Procedure, *supra*, Appeal § 409, p. 461.)

Appellant contends his section 473 motion to set aside was timely and he submitted sufficient evidence to warrant setting aside the dismissal. Appellant’s section 473 motion did no more than offer an explanation why he did not appear at the hearing at which his case was dismissed, i.e., he does not drive and the friend who was going to drive him to court became too ill to drive that morning. Appellant offered no reasons why the action should not have been dismissed other than to refer to the preference for trial on the merits. (See *MST Farms v. C. G. 1464* (1988) 204 Cal.App.3d 304, 306.) Given appellant’s long history of abuse of the discovery process, as detailed above, the court did not abuse its discretion when it dismissed the case. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443; *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 489-490 disapproved on another point in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4 [court dismissed the action after insured failed to obey a court order and repeatedly failed to provide discovery].)

³ Because no notice of entry of order was filed by the court clerk or respondent, the operative appeal period was 180 days after the date of entry of the order. (See *Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 210.)

DISPOSITION

The order is affirmed. Respondent to recover costs on appeal.

WOODS, J.

We concur:

JOHNSON, Acting P.J.

ZELON, J.